

TEXT OF THE DECISION

Judge Brantley's Review of the Points in Controversy.

A WELL-WRITTEN OPINION

Reasons Why the Court Denies a Temporary Injunction Against the Butte, Anaconda & Pacific Railway Company.

The following is the text of Judge Brantley's decision in the injunction suit brought by the Montana Union Railway Company against the Butte, Anaconda & Pacific Railway Company:

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge.

Montana Union Railway Company et al.,

Plaintiffs,

vs.

The Butte, Anaconda & Pacific Railway Company et al.,

Defendants.

This is a suit by the plaintiffs against the defendants for damages for trespass alleged to have been committed by the defendants upon their right of way and the line of their road. To their cause of action for trespass the plaintiffs have submitted an equitable cause of action, alleging that the defendants are threatening to continue the trespasses complained of in the first cause of action, that they are contemplating other violations of the plaintiffs' rights, and that these acts and threatened acts on the part of the defendants will result in irreparable injury to the plaintiffs and that the plaintiffs are without adequate remedy at law. The plaintiffs therefore ask that an injunction issue restraining the defendants from these threatened acts until a final hearing of this cause when all matters in dispute will have been adjudicated, and then that the injunction be made perpetual. By agreement of attorneys the hearing was upon oral testimony of witnesses and documentary proof, as upon ordinary trial of causes. The hearing was at chambers on the 28th, 29th and 30th of August, 1893.

The facts as they appear from the proof are the following: Plaintiff, the Montana Railway Company, was at one time a corporation organized under the laws of Montana, but whether it is still in existence the proof does not show. The other plaintiff company is in possession of a railway property of the Montana Railway Company, including that described in the complaint, and is engaged in operating it, but whether under a lease or otherwise it does not appear. The defendant company engaged in constructing a railway from the city of Butte to the town of Anaconda, including switches, sidetracks, and spurs at the town of Anaconda and in its vicinity, which may be considered a parallel of the former line of the Montana Railway Company and at the latter point. In the vicinity of Anaconda several crossings of the Montana railway are contemplated by the defendant company, but the defendant company is not now engaged in making any of said crossings, nor has it made any attempt to make any of them, it merely having caused its lines to be surveyed, showing where the crossings will probably be. There has been no interference, nor any threatened interference, by the defendant or its employees or contractors, with any of the right-of-way, road bed or operations of the Montana Railway Company or the other plaintiff company, at any point on its main line. The Montana Railway Company has a double spur connecting the upper works or the smelter of the Anaconda Mining company, situated near the middle of the south line of section 35, township 5 north, range 11 west, with the concentrator of the same company which occupies about the same position on the south line of section 35, township 5 north, range 11 west.

About midway between the upper works and the concentrator a spur or switch-back branches off on the north of this double spur and runs the same distance north of the upper works where the Anaconda company's ore houses are situated. The proposed line of the defendant company connects the upper and lower works of the Anaconda Mining company, coming in from the west and running immediately north of the spur last above mentioned of the Montana Railway Company and parallel with it and the main spur to the concentrator or lower works, near which one of the contemplated crossings is situated.

Several other crossings are contemplated, as many as seven or eight, but none of these are complained of except the one last above mentioned and one other, which might be termed a double crossing because it crosses three rights in close proximity to each other belonging to the Montana Railway Company, situated immediately south of the upper works or smelter. The interference mostly complained of is at a point a short distance east of the upper works, and consists of the defendant company's putting its line of road at one point within 15 feet of the road of the plaintiff Montana Railway Company and within 17 feet at other points of the line of the spur or switch-back running to the ore houses of the upper works of the Anaconda Mining company. In prosecuting the work of excavation along this switch-back or spur, the contractors, Tiedie and Poley, make use of the track of the Montana Railway Company for tramway purposes in wasting material. Their tramway is a temporary structure, running for 200 or 250 feet along the ties of the main track, and for a part of the way between the rails to the gulch towards the east from that point where they waste the debris of excavation. In wasting their material or debris, they have dumped quantities of it against the supports of a bridge crossing this gulch belonging to the Montana Railway, and have so injured the said bridge as to render it unsafe. This use of the track is for construction purposes only and is not intended to be permanent. The injury to the bridge could be repaired at an expense of probably not more than \$1,000. The use of the track was going on at the beginning of this suit and was stopped by the restraining order issued herein on the 17th of August, 1893. Since that time a large quantity of dirt and other debris dumped against the supports of the said bridge has been removed. By the dumping of this dirt into the gulch the defendants were building an approach for a bridge which they expect to build over the gulch for the defendant company. The injury done to the bridge seems to have been accidental rather than wilful or intentional.

A short distance to the west of this point the defendants, in prosecuting their work of excavation some days prior to the beginning of this suit, left for some space insufficient support between their excavations and the plaintiffs' track, but had substantially repaired this before the beginning of this suit by moving a few feet to the south the track of the plaintiff to what was the original line of the said track when this spur was constructed in 1889 or 1890. The excavations and the supports are completed at this point, but are still in progress towards the east and along the line where the tramway is used for dumping purposes. The proof is not clear as to whether the defendants have occupied any part of the original road bed of the plaintiffs at the point where the track was moved, nor does it appear

clearly what the character or extent of the Montana Railway company's title is to any right-of-way along this spur. The most that can be said of it is that this title is merely a possessory right by way of license from James B. Haggin, one of the principal owners of the stock of the Anaconda Mining company, and the owner of the lands along this part of the road. The deeds introduced by the plaintiffs failed to show any title in either of them over Haggin. The defendant company has laid off its road and entered upon the work of construction under a license from James B. Haggin, the owner of the land over which both roads run. It further appears that the work in controversy has not been used for several weeks owing to the closing down of the smelter, and it was hinted in the proof that this closing down was brought about by the manager of the Anaconda Mining company in order to render the road useless for the time being so that the defendant company could get its road done without having to pay too heavy damages.

It further appears that the work of building the main line of road has been going on near the place where the interference complained of is for some four weeks or more with the full knowledge of the plaintiffs. Some time in the latter part of July the president of the Montana Union Railway Company went over the whole ground along the spur or switch-back with Mr. Daly, the manager of the Anaconda Mining company and one of the directors of the defendant company, and though he understood the character of the work being done, and that it was done along the line he made no objection to any part of it. From that time till this suit was brought the work went on steadily with full knowledge on the part of the plaintiff, without objection or protest from him until this suit was brought. It further appears that some damage was done to the bridge above mentioned, some time in the early part of July, but this was repaired at the cost of the defendants. It also appears that at a subsequent time, before the beginning of this suit, the president of the Montana Union Railway Company knew of temporary obstructions being placed upon the track by the defendants in the progress of their work along the switch-back or spur, but made no protest or objection thereto, except to caution them to take them off soon, adding that if this should be done it would be all right.

The plaintiffs insist that under these facts they are entitled to an injunction restraining the defendants from making any crossing over plaintiff's track until they are authorized to do so by this court, and, second, from prosecuting their work along this switch-back or spur until they have applied to this court to have their right of way condemned by this court.

1. The constitution of Montana guarantees to every railroad company the right with its road to intersect, connect with or cross any other railroad. The constitution also provides that private property shall not be taken or damaged for public use without just compensation having been made or paid into court for the owner.

Under these provisions of the constitution while the defendant would perhaps have the right to make the crossings contemplated by it, yet it would not have the right to determine their character and the regulations under which they should be made. It is the policy of the constitution to encourage parallel and competing lines and every facility is guaranteed to a company engaged in constructing such a line, not only for the purpose of acquiring a right of way and facilities for its convenience and usefulness along its main line, but also for its side tracks, spurs and switches, so that it may compete with its rival to the fullest extent. A company engaged in constructing a competing line, however, must not take upon itself the right to determine what private property it shall take and appropriate to its own use. The taking of such property must be regulated by negotiation between such company and the owner thereof, or, when this fails, by a court of competent jurisdiction, to which application must be made for that purpose. If, in the prosecution of its work such a company attempts to cross the property of another railroad company without having regular authority by negotiation, or without being authorized to do so by a court of competent jurisdiction, it will be restrained upon complaint being made to the proper court. There is no presumption, however, that a company engaged in constructing a road will violate the law in thus attempting to take property. There are portions of our state over which a railroad cannot be built without intersections and crossings with other roads. From the construction of an enterprise of this kind, taken, and when the preliminary surveys are made, these crossings and the condemnation of private property in aid of the enterprise are contemplated. Does the fact that such steps are contemplated give the right to the company to cross the rights will be violated? The earliest time at which it has a right to complain with any show of justice is when a violation of its rights is threatened or immediately attempted, and a prevention of such violation can be secured only by an appeal to the courts. A company engaged in a new enterprise is as much entitled to be protected from vexatious litigation and annoyance as one which has its enterprise completed and in full operation. A railroad company with an established business has no more right to vex and harass a new company in the first beginnings of its enterprise than a contractor with premature litigation than has the new company to take and appropriate to its own use the property, privileges and franchises of the old company. There is no doubt from the proof introduced in this case that the plaintiff company, in order to complete its enterprise, must make several crossings over the property and line of the plaintiff company's. It has already made some crossings, but these have been adjusted by negotiations between the parties themselves. From the proof it seems that several contemplated fully as much as those complained of, will also have to be made. For some reason best known to the plaintiffs themselves they have chosen to complain of certain crossings in the vicinity of the smelting works of the Anaconda Mining company and no others. These crossings the defendant has made no attempt to make beyond locating the line over which it proposes to lay its road. It has done no work in the immediate vicinity of these crossings. It has not occupied the right-of-way of the plaintiffs, nor done any act, nor threatened to do any, that would seem to indicate an intention on its part to violate any rights of the plaintiff or reference to these crossings. It is but too apparent, so far as this branch of the case is concerned, that the plaintiffs, being rival companies, are anxious to prevent the defendant company from putting its road into such a position that it can share with the plaintiff company a large amount of business now controlled exclusively by the plaintiffs. Until the defendant company has manifested some intention to make these crossings in violation of law and the plaintiffs' rights, the plaintiffs will not be allowed to vex and harass the defendant nor its contractors and employees by premature litigation. If the defendant and employees were to make these crossings by their act, they have no regard for the plaintiff's rights and attempt to appropriate their property without their consent, it will be restrained upon a proper application to this court. So far as the crossings are concerned this application is denied for the present.

2. The other branch of the case pre-

(Continued on the Eighth Page).

CHEAP ADVERTISEMENTS

Advertisements under this head one cent per word each insertion. Special rates on contracts for definite periods. No advertisement accepted for less than six cents.

FOR SALE.

FOR SALE—Lot in Montrose Addition, near Address N. Standard office, Butte.

FOR SALE OR RENT—A good paying butcher shop at Burlington, Mont. Jas. Knox.

FOR SALE OR RENT—Montana Central hotel, built, good location, street car pass from all parts of the city; 25 furnished rooms; good bar room, large, handsome dining room, and well furnished or unfurnished rooms; block from Great Northern depot. For rent \$1.00. 222 Utah Avenue, Butte, P. O. Box 607.

MISCELLANEOUS.

WANTED—To buy a single light delivery wagon. P. O. Box 252, Butte.

WANTED—A situation as nurse or nursemaid of a sick person. Apply to Standard, Butte.

WANTED—A position as companion or nurse to a sick lady by a middle-aged lady. Address Box 41, Butte, Montana.

FURNISHED ROOMS for housekeeping, also front rooms for rent. 255 South Main St.

CAME to my ranch, a sorrel horse, four white feet, branded with diamond and half circle in center of left shoulder. Call on or address George Clark, Pipestone Springs.

MRS. J. HELD, clairvoyant medium, locating mines a specialty. 20 East Park St., Butte.

CHARLES SULLIVAN, city scavenger, day or night work; proprietor orders promptly mailed orders will receive prompt attention. 400 South Colorado street, Butte.

LOST—Strayed or stolen, a dapple gray mare, brand P. O. on left hip, with tail cut off about even with flank; newly shod. \$25 reward for return of same to Dr. W. C. Harding, South side.

LOST—A bay horse, branded with H. on left chest and hind quarter, left shoulder. The other mare branded 7 on left hip and H. on left jaw. Reasonable reward for return to Geo. Phelps' ranch, 2 miles northwest of Walkerville.

NOTICE TO CREDITORS—Estate of Bird Draper, deceased. Notice is hereby given by the undersigned, administrator of the estate of Bird Draper (known as Bird Draper), to the creditors of said estate, and all persons having claims against the said deceased, to exhibit them with the necessary vouchers, within four months after the date of publication of this notice, to the said administrator, at Garrison, or to W. H. Trippett, the attorney for said estate, at Deer Lodge, the same being the place for the filing of the claims of said estate in the county of Deer Lodge, state of Montana.

R. F. BROWN, Administrator of the estate of Bird Draper, deceased.

Dated April 2, 1893.

RESOLUTION—Resolution ordering the construction of a sanitary sewer in the city of Anaconda, and providing for the advertising for bids for the same.

Be it resolved by the city council of the city of Anaconda, that a sanitary sewer be constructed of vitrified clay pipe twelve (12) inches in diameter properly connected with all necessary manholes, and all persons having claims against the said city, to exhibit them with the necessary vouchers, within four months after the date of publication of this notice, to the said administrator, at Garrison, or to W. H. Trippett, the attorney for said estate, at Deer Lodge, the same being the place for the filing of the claims of said estate in the county of Deer Lodge, state of Montana.

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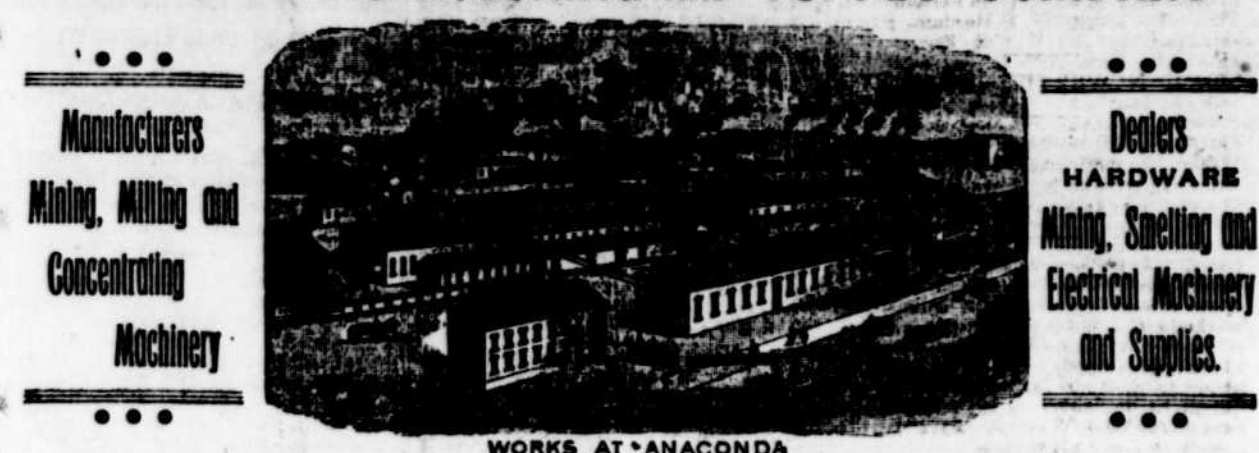
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TUTTLE MANUFACTURING AND SUPPLY COMPANY

WORKS AT ANACONDA
STORES: ANACONDA AND BUTTE

GOLD BAR MINING CO.—Location of mines of which it is an unorganized mining district at the head of Warm Springs creek, Deer Lodge county, Montana. NOTICE—There is delinquent upon the following described stock, on account of Assessment No. 1, payable Sept. 15, 1893, Assessment No. 2, payable Jan. 10, 1894, Assessment No. 3, payable Aug. 12, 1894. The several amounts set opposite the names of the respective shareholders, as follows:

NO. 1.		Certificates No.	No. of Shares.	Amount.
NAMES.				
Herman Hoffman.....	85	10,500	\$15 75	
NO. 2.				
James Alchison.....	10	1,000	1 50	
..	11	1,000	1 50	
..	12	500	75	
..	13	500	75	
..	14	500	75	
..	15	500	75	
..	16	500	75	
Joseph Schott.....	17	500	75	
Geo Busch and Geo Albeck.....	18	1,000	1 50	
Henry Chang.....	19	1,000	1 50	
James McNeilly.....	83	2,000	3 00	
Herman Hoffman.....	85	10,500	25 75	
Thos Leary.....	86	1,000	1 50	
..	110	1,000	1 50	
..	111	1,000	1 50	
..	112	1,000	1 50	
..	113	1,000	1 50	
..	114	500	75	
..	115	500	75	
..	116	500	75	
..	117	500	75	
..	118	1,000	1 50	
..	119	1,000	1 50	
..	120	4,500	6 00	
..	122	8,000		
..	123	5,000		
..	124	8,000		
..	125	1,000		
..	126	4,000		
..	127	500		
				Pat. \$16 50
NO. 3.				